173 (3)

No. 10-375

In The
Supreme Court of the United States

BERNICE PEREZ,

Petitioner,

vs.

WELLS FARGO BANK MINNESOTA, NATIONAL ASSOCIATION AS TRUSTEE FOR REGISTERED HOLDERS OF OPTION ONE MORTGAGE LOAN TRUST 2002 ASSET BACKED CERTIFICATES SERIES 2002-A WITHOUT RECOURSE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New York Appellate Division Second Judicial Department

BRIEF IN OPPOSITION

ALAN F. SUCH ESQ.
FEIN, SUCH & CRANE LLP
747 Chestnut Ridge Road,
Suite 200
Chestnut Ridge, New York 10977
(845) 371-4700
afs@feinsuch.com

Counsel for Respondent

October 20, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is Petitioner entitled to a Writ of Certiorari based on the same failed arguments involving settled New York foreclosure law that were considered and rejected by the State Appellate Court on more than one occasion?

ANSWER: No.

2. Does Petitioner present *any* reason whatsoever why this Petition should be granted under *Supreme Court Rule* 10?

ANSWER: No.

CORPORATE DISCLOSURE STATEMENT

Respondent Wells Fargo Bank N.A.'s parent corporation is Wells Fargo & Company and Wells Fargo & Company is a publicly held corporation that owns 10% or more of the stock of Wells Fargo Bank N.A. Except for Wells Fargo & Company, no other publicly held corporation owns 10% or more of the stock of Wells Fargo Bank N.A.

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STATEMENT OF THE CASE

Petitioner is petitioning for a Writ of Certiorari based upon her (repeatedly) failed appeal from a New York state court Judgment of Foreclosure and Sale. The two cornerstones of Petitioner's Petition (buried amid her stream of consciousness attack on the character of Respondent and anyone remotely connected with it) are her relentless attack on her default under the mortgage claimed by Respondent and an alleged lack of standing on the part of Respondent.

The simple fact is, Petitioner defaulted under the mortgage and then under a repayment plan that attempted to address her mortgage arrears. Respondent filed this foreclosure action as was its right under New York law and Petitioner filed a contesting Answer. However, Petitioner did not raise a lack of standing on the part of Plaintiff as an Affirmative Defense, nor did she file a pre-answer motion to dismiss on that ground, thus effectively waiving that defense under New York law.

The state Trial Court and the Second Department and the Court of Appeals ruled in Respondent's favor.

There is *no* reason whatsoever to grant this Petition involving a *2003* foreclosure case.

REPLY TO STATEMENT OF FACTS

Petitioner Bernice Perez ("Petitioner") is petitioning this Honorable Court for a Writ of Certiorari seeking relief from the state Trial Court's September 24, 2008 Judgment of Foreclosure and Sale and the affirming thereof by the Supreme Court of New York Appellate Division, Second Department and the New York Court of Appeals.

This is an action commenced on July 17, 2003 to foreclose a $292,000 first purchase money mortgage given by Petitioner on real property commonly known as 45 Oakland Avenue, Mount Vernon, NY 10552.

Petitioner filed a contesting Answer. However, Petitioner did not raise a lack of standing on the part of Plaintiff as an Affirmative Defense. Petitioner did not file a pre-answer motion to dismiss on that ground.

Respondent was granted Summary Judgment striking Petitioner's contesting Answer and dismissing her affirmative defenses on December 16, 2005.

On January 13, 2006, Petitioner appealed from the Trial Court's Order granting Summary Judgement.

By decision and Order dated June 12, 2007, the Appellate Division, Second Department affirmed the Trial Court's granting of Summary Judgment to Respondent. (Appendix G page 108) Petitioner did not seek reconsideration of this Order nor take any further appeal from same.

Respondent was granted a Judgment of Foreclosure and Sale on September 24, 2008. (Appendix K page 123)

On October 21, 2008, Petitioner appealed from the Trial Court's September 24, 2008 Judgment of Foreclosure and Sale. The Appellate Division, Second Department, in an opinion dated February 9, 2010, affirmed the Judgment of Foreclosure and Sale. The Second Department specifically rejected Petitioner's claims of lack of standing and lack of service of process. (Appendix O page 184)

Petitioner moved for leave to appeal to the Court of Appeals for the State of New York from the Second Department decision. Petitioner's Motion was denied by Order dated May 6, 2010. (Appendix P page 229)

Petitioner now is petitioning this Court for a Writ of Certiorari.

REASON WHY THE PETITION MUST BE DENIED

THE STATE TRIAL COURT PROPERLY GRANTED AND THE STATE APPELLATE COURT PROPERLY AFFIRMED THE JUDGMENT OF FORECLOSURE AND SALE; THERE ARE NO COMPELLING REASONS TO GRANT THIS PETITION.

Petitioner is petitioning for a Writ of Certiorari based upon her (repeatedly) failed appeal from a New

York state court Judgment of Foreclosure and Sale. The two cornerstones of Petitioner's Petition (buried amid her stream of consciousness attack on the character of Respondent and anyone remotely connected with it) are her relentless attack on her default under the mortgage claimed by Respondent and an alleged lack of standing on the part of Respondent.

Petitioner's attack on her default under the mortgage was the subject of a Motion for Summary Judgment by Respondent which was granted by the state Trial Court.

The grant of Summary Judgment is the procedural equivalent of a trial and results in a final judgment on the merits. *Collins v. Bertram Yacht Corp.*, 42 N.Y.2d 1033, 399 N.Y.S.2d 202 (1977).

Petitioner has had her "trial". She lost.

Petitioner appealed from the Order for Summary Judgment. She lost.

The above undeniable facts proved fatal to Petitioner's appeal to the New York Appellate Division Second Department as a matter of law. *243 West 98th Condominium v. Shapiro*, 12 A.D.3d 591, 786 N.Y.S.2d 67 (2nd Dept. 2004). Petitioner raised the same failed arguments on appeal to the Second Department regarding her contention that she did not default under the mortgage that were already considered and rejected by the Appellate Court in her prior appeal to that very Court.

Petitioner is *still* attempting to jump on the standing bandwagon after having litigated this matter for almost six years and without having raised this defense in her Answer or in a pre-answer motion to dismiss before the state Trial Court. This undeniable fact was fatal to her appeal as a matter of New York state law, as Petitioner had effectively waived this defense. *Wells Fargo Bank Minnesota NA v. Mastropaolo,* 42 A.D.3d 239 (2nd Dept. 2007); *HSBC Bank USA v. Dammond,* 59 A.D.3d 679 (2nd Dept. 2009).

When a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings and equity will not intervene. *First Federal Savings Bank v. Midura,* 264 A.D.2d 407, 694 N.Y.S.2d 121 (1999). Once a mortgagor's default has been declared and the mortgage loan accelerated, the mortgagee is not required to accept a tender of less than full repayment as demanded. *Id.*; *EMC Mortgage Corp. v. Stewart,* 2 A.D.2d 772, 769 N.Y.S.2d 408 (2003).

The simple fact is, Petitioner defaulted under the mortgage and then under a repayment plan that attempted to address her mortgage arrears. The Trial Court and the Appellate Court have already ruled in Respondent's favor in this regard.

Petitioner's desperate attempt to raise lack of standing as a defense was and remains frivolous as a matter of New York law.

A Petition for a Writ of Certiorari shall be granted "only for compelling reasons." *Supreme Court Rule* 10. Petitioner does not even suggest the existence of any of the reasons set forth in *Supreme Court Rule* 10(a)(b) or (c).

There is *no* reason whatsoever to grant this Petition involving a *2003* foreclosure case.

CONCLUSION

Based on all the foregoing, it is respectfully submitted that the Petition must be denied.

Respectfully submitted,

ALAN F. SUCH ESQ.
FEIN, SUCH & CRANE LLP
Counsel for Respondent

747 Chestnut Ridge Road,
Suite 200
Chestnut Ridge, NY 10977
(845) 371-4700

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